U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, D.C. 20001-8002

Date: July 9,1 998
Case No. 97 INA 533

In the Matter of:

LOCKE, KASAL, FARRIS & COMPANY,
Employer,

on behalf of

MARIA SOCORO TAN,
Alien.

Appearance: D. E. Korenberg, Esq., of Encino, California, for Employer and Alien

Before: Huddleston, Lawson and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from a labor certification application that was filed on behalf of MARIA SOCORO TAN ("Alien") by LOCKE, KASAL, FARRIS & COMPANY (Employer") under § 212 (a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a) (5)(A) ("the Act"), and regulations promulgated thereunder at 20 CFR Part 656. The U.S. Department of Labor Certifying Officer ("CO") at San Francisco, California, denied the application, and the Employer appealed to the Board of Alien Labor Certification Appeals pursuant to 20 CFR § 656.26.[1]

[1]The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c).Administrative notice is taken of the Dictionary of Occupational Titles, ("DOT") published by the Employment and Training Administration of the U. S. Department of Labor.

Under § 212(a)(5) of the Act, an alien seeking to enter the United States to perform either skilled or unskilled labor may receive a visa, if the Secretary of Labor has decided and has certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor; and (2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed at that time and place. Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. The requirements include the responsibility of an Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means to make a good faith test of U.S. worker availability.

STATEMENT OF THE CASE

On October 18, 1994, the Employer applied for alien labor certification on behalf of the Alien to fill the position of "Accountant" by the Employer, which was an "Accounting Firm."AF 76. The position was classified as an "Accountant" under DOT Occupational Code No. 160.162-018.[2] The Employer described the job duties as follows:

> Prepare profit and loss statements for specified accounting periods, balance sheets and other reports as required. Responsible for the preparation of payroll statements and deductions and payroll tax returns. Will direct clientele in the implementation of general accounting systems for keeping accounts and records of disbursements, tax payments and general ledgers.

AF 76 at Item 13. As the Other Special Requirements, the Employer said that the applicants would be tested in ability to utilize 10 key by touch, Time and Billing Program, Lotus 123, Symphony, ACCPAC, SBT Payroll Program, Mas 90, and Quicken. In addition, said the Employer, the applicants, "Must have the equivalent to a CPA certificate issued by any state or country. Must have gained accounting experience with Accounting Firm." Employer required a baccalaureate degree in which the major field of study was Accounting plus five years of experience in the Job Offered or five years of experience in the Related Occupation of

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[2] 160.162-018, **Accountant** (profess. & kin.) Applies principles of accounting to analyze financial information and prepare financial reports: Compiles and analyzes financial information to prepare entries to accounts, such as general ledger accounts, documenting business transactions. Analyzes financial information detailing assets, liabilities, and capital, and prepares balance sheet, profit and loss statement, and other reports to summarize current and projected company financial position, using calculator or computer. Audits contracts, orders, and vouchers, and prepares reports to substantiate individual transactions prior to settlement. May establish, modify, document, and coordinate implementation of accounting and accounting control procedures. May devise and implement manual or computer-based system for general accounting. May direct and coordinate activities of other accountants and clerical workers performing accounting and bookkeeping tasks. GOE: 11.06.01 STRENGTH: S GED: R5 M5 L3 SVP: 8 DLU:88

"Accountancy." *Id.*[3] The six U. S. job applicants who responded after this position was advertised and posted, were rejected by the Employer. AF 75, 81-83.

Notice of Findings. Subject to the Employer's rebuttal under 20 CFR § 656.25(c), the CO denied certification in the Notice of Findings ("NOF") dated July 19, 1996. AF 69-74. The CO found that the Employer had imposed restrictive requirements as job qualifications, and had rejected U. S. workers who appeared to meet the job requirements.

(1) Citing 20 CFR § 656.21(b)(2)(i)(A), the CO found unduly restrictive hiring criteria under which Employer required (a) CPA certification or its equivalent "from 'any state or country,'" (b) five years of experience under the Job Title of "Accountant" or in the Related Occupation of "Accountancy," and (c) specified experience with "Time and Billing Program," "Symphony, ACCPAC, SBT payroll Program, MAS 90 and Quicken." (a) The CO found no evidence that U. S. employers normally consider "CPA certification" from any foreign country to be equivalent to Certified Public Accountant licensure in the United States, observing that the requirements of skill and knowledge were not shown to be the same in all countries.[4] (b) The CO observed that while the Employer's five year experience requirement fell within the SVP stated in the DOT, licensure as a Certified Public Accountant is normally considered to be the highest measure of qualification for an Accountant in the United States.[5] The CO said there is no evidence that an applicant licensed as a certified public account in the U. S. would not normally be considered qualified with less than five years' experience.
"At the same time," the CO concluded, "there is also no evidence that a holder of CPA certification from any country outside the United States and five years would normally be considered to possess qualifications considered in the United States to be equivalent to a licensure as a certified public accountant in the United States." (c) The CO said that accountants who have

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[3]See AF 78 for Employer's discussion of the distinction between "Accountancy" and the work of an "Accountant." As this explanation explicitly referred to the need to extent the job requirements and hiring criteria to encompass the qualifications, it is recognized that those added remarks were treated as having been incorporated by reference in the CO's findings.

[4]The CO said, "There is no evidence that U. S. employers normally consider foreign CPA certification from any country to be the same as licensure as a Certified Public Accountant in the United States. The skill/knowledge requirements are not shown to be the same in all countries." The CO continued, "However, U. S. accountants would not normally have the opportunity to obtain foreign CPA certification from 'any country' and therefore it appears that U. S. accountants who have not obtained licensure as CPAs in the United States would be excluded. However, there is no evidence that the holder of any foreign CPA certification possess qualifications for the position at hand that U. S. accountants similarly also not licensed as CPAs in the United States would necessarily lack." The CO concluded,"This requirement appears tailored to the background of the alien, who has foreign certification but has not become a certified public accountant in the United States."

[5]The Employer's hiring criteria appeared to require CPA licensure from the U. S. applicants, only, because U. S. accountants ordinarily would not have the opportunity to obtain the equivalent license from a foreign country. While the Employer was willing to accept such equivalent certification from any foreign country from foreign applicants under these circumstances, it failed to did not explain why it did not require U. S. licensure from all candidates for the job without exception, said the CO.

experience in using computerized accounting programs or applications are not normally required to offer experience with every software package that a prospective employer has in place. Noting Form ETA 750 B, the CO added "In this instance, the requirements appear tailored to the background of the alien, however, [as] there is no evidence that the employer has normally required experience with the same exact set of programs or applications." The CO reasoned that an otherwise qualified applicant who is experienced in the use of programs offered by other software makers should be able to adapt to the use of Symphony, ACCPAC, SBT payroll Programs, MAS 90, and Quicken in a relatively short period of time. By way of rebuttal the CO then directed the Employer either to delete its requirement of expertise in the computer software identified in Form ETA 750 A or to prove that the skill it specified was common for this occupation in the United States or was justified by business necessity.

(2) The NOF then addressed the Employer's rejection of apparently qualified U. S. workers in violation of 20 CFR §§ 66.21(b)(6) and 656.24(b)(2)(ii), noting that Mr. Jumalon and Mr. Tadros were both considered to be qualified.[6] Citing **Gencorp**, 87 INA 659 (Jan. 13, 1988), the CO directed the Employer to establish that it had rejected both of these U. S. workers for reasons that were lawful and job related.

Rebuttal. The Employer's September 23, 1996, rebuttal addressed the issues stated in the NOF. AF 21-55.[7] (1) As to CPA certification "from any state or country" the Employer argued that "[T]he issue is whether the requirement meets the 'business necessity' test set forth in the case of **Information Industries, Inc.**, 88 INA 082 (Feb. 9, 1989)(*en banc*)." Employer said that it is required to show that this requirement bears a reasonable relationship to the occupation in the context of its business and is essential to the performance of the job duties it had described in Item 13 of Form ETA 750 A.[8] It argued that the preparation for the CPA examination in many states demands academic courses and preparation, whose successful completion assures the prospective employer of desirable qualities of intellect and character in job applicants. This, said the Employer, was the evidence to prove that its CPA requirement bears a reasonable relationship to the occupation in the context of its business to prove business necessity under **Information Industries**. Denying that job applicants must have a foreign equivalent to CPA licensure, Employer characterized the language as providing alternatives "which could qualify a worker for the position," saying, "Furthermore, the employer simply seeks to hire an accountant with a professional license or recognition, whether this license is from the State of California or any country." From this the Employer argued that U. S. applicants do not need a foreign licensure,

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[6]Under 20 CFR § 656.24(b)(2)(ii) a U. S. worker is qualified, if by education, training, experience or by a combination of these qualifications the job applicant is able to perform in the normally accepted manner the duties of the position as it customarily is performed by other U. S. workers similarly employed.

[7]AF 38-55 appears to have been submitted as a duplicate of AF 21-37.

[8]At this point the Employer cited an Occupational Outlook Handbook training qualifications for beginning accounting and auditing positions in the Federal Government, which said *inter alia* that "professional recognition through certification or licensure also is helpful." AF 22.

reiterating its contention that it simply wished to broaden to scope of acceptable qualifications for the job. (2) Addressing the requirement of five years' experience, the Employer disputed the CO's inference that such added experience is excessive in view of its requirement of CPA licensure. The Employer contended that preparation for the examination did not duplicate the experience required and that the level of experience was within the SVP of the DOT for this job, which is four to ten years.[9] (3) The Employer disputed the CO's finding that its requirement of experience with the software it identified in Form ETA 750 A was unduly restrictive because an otherwise qualified candidate could learn to use such programs in a relatively short period of time. Contending there was no evidence to support the CO's finding, Employer characterized it as "mere speculation." After "contacting several companies," the Employer maintained that there was no way to know how much time would be required to train a "reasonable person," concluding that in practice most employers actively seek applicants who are familiar with their applications in accounting.[10] (4) Employer contested the qualifications and availability of U. S. workers Jumalon and Tadros for the position it offered. Employer denied that Mr. Tadros was rejected because of his unfamiliarity with the software programs it required, as his reply to the State Employment Security Agency ("SESA") questionnaire said he was not interested in the job because it was a staff and not a supervisory accountant position. The Employer said Mr. Tadros was rejected on grounds that had only three years of accounting experience and lacked the software experience specified in Form ETA 750 A.

Final Determination. The CO denied certification in the Final Determination issued on January 17, 1997. AF 17-20. As to the Employer's requirement for CPA certification from any state or country the CO said Employer's arguments provided no substantive information to show that foreign CPA certification "from any country whatsoever" is normally considered equivalent to or the same as certification or licensure as a Certified Public Accountant in any of the United States. On the other hand, the Employer did not demonstrate that licensure as a certified public accountant is required where the Employer accepted the qualifications of a holder of foreign certification who is not also a certified public accountant in the United States. Observing that this NOF finding was not rebutted, the CO said this provision did not broaden the applicant pool in any manner that further made this job more available to U. S. workers who were otherwise qualified as Accountants. This finding affected the NOF finding that the requirement for five years' experience was unduly restrictive under 20 CFR § 656.21 (b)(2)(i)(A). While five years' experience was within the SVP limit, this Employer's hiring criteria placed a U. S. worker who

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[9]At Appendix C the DOT defined the SVP as the amount of elapsed time required by a typical worker to learn the techniques, acquire the information, and develop the facility needed for average performance in a specific job-worker situation. "This training," Appendix C continued, "may be acquired in a school, work, military, institutional, or vocational environment. It does not include the orientation time required of a fully qualified worker to become accustomed to the special conditions of any new job. Specific vocational training includes: vocational education, apprenticeship training, in-plant training, on-the-job training, and essential experience in other jobs." At Level 8, the DOT provided for "Over 4 years up to and including 10 years" for the occupation of Accountant.

[10]The Employer did not identify either the companies contacted, the dates those contacts occurred, the individuals who furnished the information mentioned in its rebuttal, or the data thus disclosed that led the Employer to reach the conclusions expressed in its rebuttal statement.See AF 35-37.

had less than five years of experience and was a Certified Public Accountant at a disadvantage in competing for the position with a worker who offered the requisite five years' experience and foreign certification from "any country," as specified by the Form ETA 750 A. Rejecting Employer's arguments, the CO said, "However, the statements in the rebuttal do not provide information that shows how a U. S. accountant who is a Certified Public Accountant but possesses less than 5 years professional accounting experience is not qualified whereas at the same time a holder of a CPA from any country and 5 years experience is qualified." The CO rejected Employer's rebuttal argument against the finding that its requirement of specified software skills was an unduly restrictive violation of 20 CFR § 656.21 (b)(2)(i)(A). Finding that the rebuttal did not carry the burden of proof as to this issue the CO explained, "Where the employer in rebuttal refers to the differences between individuals as the basis for [its] inability to determine how much time would be required to learn new programs or applications, there is no specific information given about any of the programs or applications cited in the NOF, and no information to suggest that the employer has considered any specific training needs for any of the applications. The employer's statement as to having contacted several companies is not specific as to source or content of questions asked and response." Applying these findings to the rejection of two U. S. workers, the CO said the Employer clearly cited unduly restrictive requirements as its basis for disqualifying Mr. Jumalon. While disinterest in the job appeared in Mr. Jumalon's response to the post recruitment questionnaire, the Employer reported that it had already rejected him on the basis of its unduly restrictive requirements before he ever received the SESA questionnaire. Finally, observing that Mr. Tadros was discouraged by the unduly restrictive five years of experience Employer required, even though licensure as a certified Public Accountant was pending for him, the CO said the Employer was not justified in requiring five years' experience in view of this applicant's professional status.

Appeal. After certification was denied, the Employer requested reconsideration and BALCA review of the Final Determination, and it submitted written arguments. Although it addressed the CO's subordinate and concluding findings in the Final Determination, the request for reconsideration and appeal essentially restated the Employer's rebuttal arguments. **Harry Tancredi**, 88 INA 441 (Dec. 1, 1988)(*en banc*). The CO denied reconsideration and forwarded the file for review on March 3, 1997.

Discussion

The issue to determine in reviewing the CO's denial of alien labor certification is whether the hiring criteria in Employer's application were unduly restrictive because it required CPA certification or an equivalent licensure "from 'any state or country,'" five years of experience as an "Accountant" or in the Related Occupation of "Accountancy," and skills in the use of computer software programs entitled "Time and Billing Program," "Symphony, ACCPAC, SBT payroll Program, MAS 90 and Quicken." The Employer's rebuttal and brief clearly indicated that it was aware of the criteria to follow in proving the business necessity of its restrictive requirement under

Information Industries, Inc., 88 INA 082(Jan. 13, 1988)(*en banc*).

While an employer may adopt any qualifications it may fancy for the workers it hires in its business, when an employer seeks to apply restrictive qualifications in weighing the applications of U. S. job seekers while testing the labor market for alien labor certification its job criteria are limited by the Act and regulations. Under 20 CFR § 656.24(b)(2)(ii) a U. S. worker is considered qualified for the position if, based on his education, training, and experience, he is able to perform the job in a normally accepted manner. In general, an applicant is considered qualified for the job if he meets the minimum requirements specified for the job in the application. 20 CFR § 656.21(b)(2) provides that,

> The employer shall document that the job opportunity has been and is being described without unduly restrictive job requirements: (i) The job opportunity's requirements, unless adequately documented as arising from business necessity: (A) Shall be those normally required for the job in the United States; (B) Shall be those defined for the job in the *Dictionary of Occupational Titles (D.O.T.)* including those for subclasses of jobs... .

United Parcel Service, 90 INA 090 (Mar. 28, 1991); **Mancillas International Ltd.**, 88 INA 321 (Feb. 7, 1990); **Microbilt Corp.**, 87 INA 635 (Jan. 12, 1988).

As the Employer argued that the CO had failed to carry the burden of proof as to the pivotal issue, it is appropriate to observe that labor certification is a privilege that the Act expressly confers by giving favored treatment to a limited class of alien workers, whose skills Congress seeks to bring to the U. S. labor market in order to satisfy a perceived need for their services. 20 CFR §§ 656.1(a)(1) and (2), 656.3 ("Labor certification"). The scope and nature of the grant of this statutory privilege is indicated in 20 CFR § 656.2(b), which quoted and relied on § 291 of the Act (8 U.S.C. § 1361) to implement the burden of proof that Congress placed on certification applicants, such as this Employer:

> "Whenever any person makes application for a visa or any other documentation required for entry, or makes application for admission, or otherwise attempts to enter the United States, the burden of proof shall be upon such person to establish that he is eligible to receive such visa or such document, or is not subject to exclusion under any provision of this Act... ."[11]

Because this Employer has applied for an exception to the Act's limits on immigration into the United States, the Panel will apply the Act and regulations to the Alien's entitlement to labor certification under the well-established principle that statutes granting exemptions from their

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[11]The legislative history of the 1965 amendments to the Immigration and Nationality Act establishes that Congress intended that the burden of proof in an application for labor certification is on the employer who seeks an alien's entry for permanent employment. See S. Rep. No. 748, 89th Cong., 1st Sess., reprinted in 1965 U.S.D. Code Cong. & Ad. News 3333-3334.

general operation must be strictly construed, and that any doubt must be resolved against the party invoking such an exemption from a statute's general operation. See 73 Am Jur2d § 313, p. 464, citing **United States v. Allen**, 163 U. S. 499, 16 SCt 1071, 1073, 41 LEd 242 (1896). In the context of this case, the applicable law required that the Employer and not the CO must carry the burden of proof as to all of the issues arising under this application for relief pursuant to the Act and regulations.

After discussing the restrictive requirements, the NOF directed the Employer to establish that each such requirement was, in fact, common for the occupation in the United States and should not be considered a "restrictive" requirement to qualify for the position. Failing such proof, the Employer was told that it must either delete the restrictive requirement or prove its business necessity for that the hiring criterion. AF 71-72. In stating the standard for justifying business necessity the CO cited **Information Industries** in directing *inter alia* the Employer to demonstrate that its job requirements bear a reasonable relationship to the occupation in the context of its business and that they are essential to the performance, in a reasonable manner, the job duties stated in its application. In the NOF the CO found no evidence supporting the equivalency in skill between a foreign licensure of a certified public accountant by any country and certification by one of the United States. The CO also found no evidence demonstrating a difference between the required five years of experience plus a foreign licensure of a certified public accountant by any country and a lesser number of years of experience plus certification by one of the United States. Finally, although the NOF warned that establishing the time required to train an otherwise qualified worker in the use of the specified software programs required the Employer to present information from its manufacturer or seller, the CO later found no evidence to prove need for experience in the identified software for qualified U. S. workers who presented experience in other professional software that was comparable in purpose and function.

Other than its lawyer's argument, the Employer's rebuttal contained the statement and opinion in behalf of the Employer by a managerial employee, but no supporting data, evidence, or other information. The CO was not required to accept Employer's written statement in lieu of independent documentation as credible or true in considering Employer's proof of the facts on which it relies. It is well established that such a written statement must be reasonably specific and indicate the sources or the bases of the facts and conclusions it asserts. It was impossible to credit or to evaluate the remarks and information received from others to which Employer's representative alluded because the Employer's spokesman failed to identify his sources or present data supporting the comments and opinions he presented, under the BALCA holding in **Gencorp**, (*supra*). Consequently, although the CO was required to give Employer's rebuttal statement the weight it rationally deserved under **Gencorp**, as a bare assertion without supporting reasoning or evidence the statement was insufficient to carry the Employer's burden of proof.[12]

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[12] **Inter-World Immigration Service**, 88 INA 490 (Sep. 1, 1989, citing **Tri-P's Corp.**, 88 INA 686(Feb. 17, 1989); and see **Carl Joecks, Inc.**, 90 INA 406 (Jan. 16, 1992), as to Employer's undocumented assertion of statements by a third party.

For these reasons, after considering the arguments in Employer's brief, the evidence of record, Employer's application for alien labor certification, the NOF, Employer's Rebuttal, and the CO's Final Determination, the panel has concluded that the rejection of Employer's application for alien labor certification by the CO is supported by the evidence of record, and will affirm the conclusion of the CO's denial of alien labor certification. Accordingly, the following order will enter.

ORDER

The Certifying Officer's denial of labor certification is hereby Affirmed.

For the Panel:

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FREDERICK D. NEUSNER
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.